The Madras Law Journal Reports

(The Supreme Court)

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*H.R. Khanna and V.R. Krishna Iyer, JJ.*

M/s. V. Guruviah Naidu and Sons, etc. .. *Appellants**

v.

State of Tamil Nadu and another .. *Respondents.*

Madras General Sales Tax Act (*I of* 1959), *Second Schedule, items* 7 (a) *and* 7 (*b*)—*Constitutional validity—Constitution of India* (1950), *Article* 304 (a)—*Scope.*

The argument that item 7 (*a*) of the Second Schedule to the Madras General Sales Tax Act would cover also inter-State sales and as such is beyond the competence of the State Legislature is untenable. Item 7 (*a*) relates only to intra-State sales and not to inter-State sales. This is clear from the language used in the item, especially the words 'purchase in the State.' Assuming that the language of item 7 (*a*) is ambiguous, it should be so construed as would sustain the constitutional validity of the said item.
[*Para.* 4.]

Article 304 (*a*) of the Constitution does not prevent levy of tax on goods: what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and item of goods in respect of the sale on which it is levied. The scheme of items 7 (*a*) and 7 (*b*) is that in case of raw hides and skins which are purchased locally in the State, the levy of tax would be at the rate of 3 per cent. at the point of last purchase in the State. When those locally purchased raw hides and skins are tanned and are sold locally as dressed hides and skins, no levy would be made on such sales as those hides and skins have already been subjected to local tax at the rate of 3 per cent. when they were purchased in raw form. As against that, in the case of hides and skins which have been imported from other States in raw form and are thereafter tanned and then sold inside the State as dressed hides and skins, the levy of tax is at the rate of 1½ per cent. at the point of first sale in the State of the dressed hides and skins. This levy cannot be considered to be discriminatory as it takes into account the higher price of dressed hides and skins compared to the price of raw hides and skins. It also further takes note of the fact that no tax under the State Act has been paid in respect of those hides and skins. [*Para.* 9.]

Cases referred to :—

Firm A.T.B. Mehtab Majidi and Co., v. *The State of Madras*, (1963) 14 S.T.C. 355:

* C.As. Nos. 1577 and 1579 (N.T.) of 1971.
2nd November, 1976.

(1964) 1 An.W.R. (S.C.) 115: (1964) 1 M.L.J. (S.C.) 115; (1964) 1 S.C.J. 355: A.I.R. 1963 S.C. 928; *A. Hajee Abdul Shukoor & Co.* v. *The State of Madras*, (1964) 15 S.T.C. 719: (1965) 1 S.C.J. 337: (1965) 1 M.L.J. (S.C.) 39: (1965) 1 An. W.R. (S.C.) 39: (1964) 8 S.C.R. 217: A.I.R. 1964 S.C. 1729.

Appeals from the Judgment and order dated 23rd March 1971 and 22nd April 1971 of the Madras High Court in Writ Petitions 1088 of 1970 and 1316 of 1971.

K. Srinivasan Senior, Advocate (*I. Subramanian* and *Mrs. S. Gopalakrishnan* Advocates, with him), for Appellant.

K. Parasaran, Advocate-General for the State of Tamil Nadu (*A. V. Rangam* and *Miss. A. Subhashini*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Khanna, J.—These appeals by special leave are against the judgment of the Madras High Court whereby that Court repelled the challenge to the validity of items 7 (*a*) and 7 (*b*) of the Second Schedule to the Madras General Sales Tax Act, 1959 (hereinafter referred to as the State Act).

2. The appellants are dealers in hides and skins. The appellants purchase raw hides and skins locally as well as in the course of inter-State trade and commerce. The raw hides and skins are converted into dressed hides and skins and are sold either locally or in the course of export. The matter relates to the assessment year 1968-69 and the dispute between the parties arises because of the inclusion in the turnover of the sale and purchase price of some of the above goods. The appellants by means of writ petitions challenged the validity of items 7 (*a*) and 7 (*b*) of the Second Schedule to the State Act. The High Court, as already mentioned, repelled the attack on the validity of those items and dismissed the writ petitions.

3. Before dealing with the contentions advanced, it may be appropriate to refer to the relevant provisions. Section 4 of the State Act is the charging section in respect of declared goods and reads thus:

> "*Tax in respect of declared goods.*—Notwithstanding anything contained in section 3, the tax under this Act shall be payable by a dealer on the sale or purchase inside the State of declared goods at the rate and only at the point specified against each in the Second Schedule of the turnover in such goods in each year, whatever, the quantum of turnover in that year."

It may be mentioned that raw hides and skins as well as dressed hides and skins, are declared goods under section 14 (*iii*) of the Central Sales-Tax Act, 1956 (hereinafter referred to as the Central Act). Section 14 (*iii*) of the Central Act reads as under:

> "It is hereby declared that the following goods are of special importance inter-State trade or commerce:
>
> ....
>
> ....
>
> (*iii*) hides and skins, whether in a raw or dressed state."

Items 7 (*a*) and 7 (*b*) of the Second Schedule to the State Act read as under:

Serial No. 1	*Description of goods* 2	*Point of levy* 3	*Rate of tax* 4
7 (*a*)	Raw hides and skins	At the point of last purchase in the State	3
7 (*b*)	Dressed hides and skins (which were not subjected to tax under this Act as raw hides and skins)	At the point of 1st sale in the State.	1½

4. So far as the validity of item 7 (*a*) of the Second Schedule is concerned, the argument of the learned counsel for the appellant is that this would cover also inter-State sales and as such is beyond the competence of the State Legislature. We are unable to accede to this contention as we are of the view that item 7 (*a*) relates only to intra-State sales and not to inter-State sales. This is clear from the language used in the item, especially the words "purchase in the State". Assuming that the language of item 7 (*a*) is ambiguous, it should be so construed as would sustain the constitutional validity of the said item. Considered in this light the occasion for the levy of tax under the above item would arise only when there is intra-State sale and not inter-State sale.

5. Regarding item 7 (*b*), the learned counsel for the appellants has contended that it is violative of clause (*a*) of Article 304 of the Constitution. The said clause reads as under:

> "304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—
>
> (*a*) impose on goods imported from other States or the Union Territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and
>
> (*b*) ...."

According to the learned counsel, there can be three types of sale transactions in respect of dressed hides and skins:

(1) Dressed hides and skins imported from outside the State of Tamil Nadu and sold within that State;

(2) Import of raw hides and skins from outside the State of Tamil Nadu. Tanning of the aforesaid raw hides and skins within the State of Tamil Nadu and the sale of the same within that State as dressed hides and skins; and

(3) Purchase of raw hides and skins within the State of Tamil Nadu and sale of the same within that State as dressed hides and skins after tanning those hides and skins.

It is urged that in respect of hides and skins covered by the third category, the local sales of dressed hides and skins will not be liable to tax under the State Act as the purchase of the raw hides and skins has already been subjected to tax under item 7 (*a*). Regarding hides and skins mentioned at (1) and (2) above, the local sales of dressed hides and skins would be subject to tax at the rate of 1½ per cent. under item 7 (*b*) as there was no levy of tax under the State Act in respect of those hides and skins. Learned counsel accordingly concludes from the above that imported hides and skins are subject to tax when sold as dressed hides and skins at the rate of 1½ per cent. whereas hides

and skins purchased in raw form locally and dressed thereafter are not subject to tax under the State Act when sold as dressed hides and skins. The contention, in other words, is that whereas dressed hides and skins sold locally but which have been made out of imported raw hides and skins are subject to tax, similar sales of dressed hides and skins made out of raw hides and skins which have suffered tax at purchase stage are not subject to tax under item 7 (*b*) of the Second Schedule of the State Act. Item 7 (*b*) is therefore stated to be discriminatory and violative of Article 304 (*a*). Reliance in this connection is placed upon two decisions of this Court in the cases of *Firm A.T.B. Mehtab Majid & Co.* v. *The State of Madras and another*[1], and *A. Hajee Abdul Shukoor & Co.* v. *The State of Madras*[2].

6. In the case of *Mehtab*[1], this Court held that the provisions of rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 discriminate between hides and skins imported from outside the State and those manufactured or produced inside the State and therefore they contravene the provisions of Article 304 (*a*) of the Constitution. Perusal of the facts of that case goes to show that the real grievance of the appellant in that case was that though there was a substantial disparity in the price of raw hides and skins and the price of dressed hides and skins, the same rate of tax was levied in respect of both types of hides and skins under section 3 (1) (*b*) of the State Act. This is clear from the following observations in that case:

> "The grievance arises on account of the amount of tax levied being different on account of the existence of a substantial disparity in the price of the raw hides or skins and of those hides or skins after they had been tanned, though the rate is the same under section 3 (1) (*b*) of the Act. If the dealer has purchased the raw hides or skins in the State, he does not pay on the sale price of the tanned hides or skins; he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales tax on the sale price of the tanned hides or skins."

7. In the case of *Hajee Abdul Shukoor*[1], this Court held that sub-section (1) of section 2 of the Madras General Sales Tax (Special Provisions) Act, 1953, discriminates against imported hides and skins which were sold up to 1st August, 1957. The rate of tax on the sale of tanned hides and skins as would appear from that judgment was

> "2 per cent on the purchase price of those hides and skins in the untanned condition, while the rate of tax on the sale of raw hides and skins in the State during 1955 to 1957 is 3 pies per rupee".

The Court in this context referred to *Mehtab's case*[2], and observed:

> "In the earlier case, discrimination was brought about on account of sale price of tanned hides and skins being higher than the sale price of untanned hides and skins, though the rate of tax was the same, while in the present case, the discrimination does not arise on account of difference of the price on which the tax is levied as the tax on the tanned hides and

1. (1963) 14 S.T.C. 355: (1964) 1 An.W.R. (S.C.) 115: (1964) 1 M.L.J. (S.C.) 115: (1964) 1 S.C.J. 355: A.I.R. 1963 S.C. 928.
2. (1964) 15 S.T.C. 719 : (1965) 1 S.C.J. 337 : (1965) 1 M.L.J. (S.C.) 39 : (1965) 1 An.W.R. (S.C.) 39 : (1964) 8 S.C.R. 217: A.I.R. 1964 S.C. 1729.

1. (1964) 15 S.T.C. 719 : (1965) 1 S.C.J. 377 : (1965) 1 M.L.J. (S.C.) 39 : (1965) 1 An.W.R. (S.C.) 39 : (1964) 8 S.C.R. 217 : A.I.R. 1964 S.C. 1729.
2. (1963) 14 S.T.C. 355 : (1964) 1 An.W.R. (S.C.) 115 : (1964) 1 M.L.J. (S.C.) 115 : (1964) 1 S.C.J. 355: A.I.R. 1963 S.C. 928.

skins is levied on the amount for which those hides and skins were last purchased in the untanned condition, but on account of the fact that the rate of tax on the sale of tanned hides and skins is higher than that on the sale of untanned hides and skins. The rate of tax on the sale of tanned hides and skins is 2 per cent on the purchase price of those hides and skins in the untanned condition while the rate of tax on the sale of raw hides and skins in the State during 1955 to 1957 is 3 pies per rupee. The difference in tax works out to 7/1600th of a rupee, *i.e.*, a little less than half naya paise per rupee. Such a discrimination would affect the taxation up to the 1st of August, 1957 when the rate of tax on the sale of raw hides and skins was raised to 2 per cent. of the sale price."

8. None of the circumstances which led this Court to strike down the relevant provisions in the above mentioned two cases exists in the present case. In *Mehtab's case*[1] discrimination was found to exist because of the fact that tax was being levied at the same rate in respect of both raw hides and skins as well as dressed hides and skins, even though the price of dressed hides and skins was much higher. The position was worse in the *case of Hajee Abdul Shukoor*[2] because in that case the sales tax was found to have been charged at a higher rate in respect of dressed hides and skins than that on the sale of raw hides and skins in spite of the fact that the price of dressed hides and skins was higher than that of raw hides and skins. The position in the present case is materially different, for here the rate of sales tax for raw hides and skins is 3 per cent., while that for dressed hides and skins is 1½ per cent. It is plain that the lower rate of tax in the case of dressed hides and skins has been prescribed with a view to offset the difference between the higher price of dressed hides and skins and the lower price of raw hides and skins. No material has been brought on the record to show that despite the lower rate of sales tax for dressed hides and skins, the imported hides and skins are being subjected to discrimination. The onus to show that there would be discrimination between the hides and skins which were purchased locally in the raw form and thereafter tanned and the hides and skins which were imported from other States was upon the appellant. The appellant, we find, has failed to discharge such onus.

9. Article 304 (*a*) does not prevent levy of tax on goods; what it prohibits is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent discrimination against imported goods by imposing tax on such goods at a rate higher than that borne by local goods since the difference between the two rates would constitute a tariff wall or fiscal barrier and thus impede the free flow of inter-State trade and commerce. The question as to when the levy of tax would constitute discrimination would depend upon a variety of factors including the rate of tax and the item of goods in respect of the sale of which it is levied. The scheme of items 7(*a*) and 7 (*b*) of the Second Schedule to the State Act is that in case of raw hides and skins which are purchased locally in the State, the levy of tax would be at the rate of 3 per cent. at the point of last purchase in the State. When those locally purchased raw hides and skins are tanned and are sold locally as dressed hides and skins, no levy would be made on such sales as those

1. (1963) 14 S.T.C. 355 : (1964) 1 An.W.R. (S.C.) 115 : (1964) 1 M.L.J. (S.C.) 115 : (1964) 1 S.C.J. 355 : A.I.R. 1963 S.C. 928.

2. (1964) 15 S.T.C. 719 : (1965) 1 S.C.J. 337 : (1965) 1 M.L.J. (S.C.) 39 : (1965) 1 An.W.R. (S.C.) 39 : (1964) 8 S.C.R. 217 : A.I.R. 1964 S.C. 1729.

hides and skins have already been subjected to local tax at the rate of 3 per cent. when they were purchased in raw form. As against that, in the case of hides and skins which have been imported from other States in raw form and are thereafter tanned and then sold inside the State as dressed hides and skins, the levy of the tax is at the rate of 1½ per cent. at the point of first sale in the State of the dressed hides and skins. This levy connot be considered to be discriminatory as it takes into account the higher price of dressed hides and skins compared to the price of raw hides and skins. It also further takes note of the fact that no tax under the State Act has been paid in respect of those hides and skins. The Legislature, it seems, calculated the price of hides and skins in dressed condition to be double the price of such hides and skins in raw state. To obviate and prevent any discrimination or differential treatment in the matter of levy of tax, the Legislature therefore prescribed a rate of tax for sale of dressed hides and skins which was half of that levied under item 7 (*a*) in respect of raw hides and skins.

10. Lastly, it has been argued that dressed hides and skins are a commodity distinct and separate from raw hides and skins and that item 7 (*b*) of the Second Schedule makes a discrimination between the sales of locally processed dressed hides and skins and those imported from other States. In this respect we find that it is not the case of the appellants that they import dressed hides and skins from other States and sell them as such in Tamil Nadu. On the contrary, the case of the appellants is that what they import from other States are only raw hides and skins which are thereafter tanned and sold as dressed hides and skins. In the circumstances, it is not clear as to what grievance the appellants can have on the score that there is discrimination between imported dressed hides and skins and the dressed hides and skins produced and manufactured within the State.

11. Apart from that it seems to us that even though dressed hides and skins have been treated as separate commodity, there is a clear nexus between hides and skins in raw form and those in dressed form. So far as the Central Act is concerned, both the raw as well as the dressed hides and skins are specified together in clause (*iii*) of section 14. It has to be orne in pmind that it is raw hides and skins which after being subjected to brocessing or tanning take the shape of dressed hides and skins. Dressed hides and skins cannot, therfore, be considered in isolation and we find no infirmity in a legislative provision which while levying tax on the sale of dressed hides and skins takes into account the levy of tax in respect of the purchase of raw hides and skins. Looked at in this light there appears to be no warrant for the proposition that preferential treatment has been shown to dressed hides and skins prepared from locally purchased raw hides and skins compared to the treatment accorded to imported hides and skins.

12. We are, therefore, of the view that the attack on the validity of item 7 (*b*) of the Second Schedule to the State Act is not well founded. We accordingly dismiss the appeals, but in the circumstances without costs.

V.K. ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*A. N. Ray, C J, M. H. Beg and V. R. Krishna Iyer, JJ.*

Cumbum Roadways (P.) Ltd .. *Appellant**

v.

Belaguru Bus Service Pvt. Ltd, and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 47—State Carriage permit—Grant of—Criteria.

Permits cannot be equated with distribution of patronage. It must be remembered that public interest is at stake when public transport services are operated. The scheme of the statute, *viz.*, the Motor Vehicles Act is that he who can serve the travelling public best, is to be chosen as the permit holder. Considerations of grace, charity and compassion at the expense of public interest are an act of unfairness to the Act.

[*Para.* 3].

The Judgment of the Court was delivered by

Krishna Iyer, J.—This appeal, without any merit, deserves to be dismissed without much ado.

2. The few facts of the case are that the appellant and the respondent, both operators of stage carriages, applied for a permit on an 86 Km. route. Marks were awarded to both under the relevant Motor Vehicles Rules to settle their comparative merit. The appellant secured 8.79 marks and the respondent 12.08. The latter thus secured an easy arithmetical victory over the former and the sense of the scheme would have ordinarily led to the award of the permit to the respondent. However, the Road Transport Authority preferred the candidate with the lesser marks on the compassionate ground that the rival with the better marks had already got a permit a couple of months before, on an overlapping route of 53 Km. On appeal, the Appellate Tribunal set aside this award and granted the permit to the one who had more merit. This has been affirmed throughout, repelling the challenge by writ petition. The aggrieved appellant contends that his permit should not have been set aside, the ground being that the respondent had got an earlier permit on a part of the route. We are not persuaded about this ground being good.

3. Permits cannot be equated with distribution of patronage. We must remember that public interest is at stake when public transport services are operated. The scheme of the statute, *viz.*, the Motor Vehicles Act is that he who can serve the travelling public best, is to be chosen as the permit-holder. Considerations of grace, charity and compassion at the expense of public interest are an act of unfairness to the Act. The conclusion, therefore, is that the appellant's claim was rightly rejected and the respondent's award was rightly made.

4. We dismiss the appeal but in the circumstances without costs.

V.K. —— *Appeal dismissed.*

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* C.A.No.424 of 1971.

10th December, 1976.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—*A.N. Ray, CJ. M.H. Beg and P.N. Shinghal, JJ.*

Madras Refineries Ltd. .. *Appellant**

v.

Chief Controlling Revenue Authority, Board of Revenue, Madras .. *Respondent.*

Stamp Act (II of 1899), *sections* 2 (17), 4 (1) *and* 40 (b)—*Scope—Stamp duty on mortgage—Deed—Principal document, test.*

A Loan and Note Purchase Agreement was executed on 20th December, 1966, between the appellant—company and the First National City Bank and others. Under that agreement the Company was to authorise the creation and issuance of secured notes, serials A and B and the notes were to be "issued under and secured by the Deed of Trust and Mortgage between the Company and the First National City Bank" It was further stated: "The notes shall be dated, shall mature, shall bear interest shall be payable, shall be secured and shall have such other terms and provisions as provided in the mortgage and shall be guaranteed by the President of India pursuant to the terms of a Guarantee Agreement (the "guarantee agreement"). in the form attached hereto as Exhibit.3"

On the question whether the instrument relating to the Deed of Trust and Mortgage would attract the levy of a stamp duty as laid down in Article 40 (*b*) of Schedule I of the Indian Stamp Act,

Held: (*i*) It is the real and true meaning of the instrument which will determine the stamp duty. It was the Deed of Trust and Mortgage which was the security for the loan, although the loan was also guaranteed by the President in terms of the guarantee agreement. The Trust and Mortgage Deed was thus executed before the execution of the Guarantee Agreement, even though both of them were executed on the same day, namely, 15th June, 1967. This Deed of Trust and Mortgage was the principal or primary security for the loan according to the terms and conditions of the agreement between the parties. It could not be said to be a "collateral agreement". The parties in fact clearly stated it in Article 1 of the Deed. The guarantee Agreement was not an instrument of sale, mortgage or settlement, and did not fall within the purview of sub-section (1) of section 4 of the Act. It was the Deed of Trust and Mortgage which was a "mortgage deed" within the meaning of clause 17 of section 2 of the Act, and it was, therefore, clearly chargeable with stamp duty at the rate prescribed, in Article 40 (*b*) of Schedule 1 of the Act.

[*Paras.* 5, 6, 7, 9, 10, 12, 13.]

Case referred to:

Lim or Asphalte Paving Co. v. I.B.C., 1 (1872) 7 Ex. 211.

P. Ram Reddy, Senior Advocate (*C. Rama-Krishna* and *A.V. Nair*, Advoates, with him), for Appellant.

L.P. Raman, Additional Solicito General (*A.V. Rangam* and *Miss A. Subbashini*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Shinghal, J.—This appeal by special leave arises out of the decision of the Madras High Court dated 9th October 1974, on a reference by the Chief

*C.A. No. 709 of 1975. *5th January*, 1977

Controlling Revenue Authority under section 57 of the Indian Stamp Act, 1899, hereinafter referred to as the Act. The Board of Revenue, Madras, which was the Chief Controlling Revenue Authority, initially stated the case raising the following questions for decision:—

(*a*) Whether the decision of the Board of Revenue that the instrument relating to the Deed of Trust and Mortgage would attract the levy of a Stamp Duty as laid down in Article 40 (*b*) of Schedule I of the Indian Stamp Act and that the debentures would be exempted from the levy of stamp duty is correct or not; and

(*b*) Whether the claim of the Respondent herein that the stamp duty is payable on the debenture under Article 27 (*a*) and on the Deed of Trust and Mortgage under Article 40(*c*) is tenable or not? The High Court directed the Board of Revenue to refer three additional questions, but ultimately took the view that the additional questions did not really arise in the case. It answered the first question in favour of the Revenue and the second question against the Madras Refineries Limited, hereinafter referred to as the Company. The Company feels aggrieved and has come up in appeal to this Court. It will be enough to state those facts which bear on the controversy before us.

2. The Company was incorporated under the Indian Companies Act, 1956, as a public limited company. An agreement known as the Loan and Note Purchase Agreement was executed between the Company and the First National City Bank and six others on 20th December 1966, by which the Company agreed to authorise the creation and issuance of $ 14,880,000 (U.S.) principal amount of its 5½ per cent. secured notes Series 'A', and $ 7,440,300,(U.S.) principal amount of its 5½ per cent. secured notes Series 'B', and the sale of, or the borrowing to be evidenced by such Notes in accordance with the terms and provisions of the agreement. The Notes were to be issued under and secured by a Deed of Trust and Mortgage between the Company and the First National City Bank. It was also agreed that the Notes shall be secured and shall have the other terms and provisions provided in the agreement and shall be guaranteed by the President of India pursuant to the terms of a "Guarantee Agreement", in the prescribed form. We shall have occasion to refer to the relevant clauses of the Loan and Note Purchase Agreement, the Deed of Trust and Mortgage and the Guarantee Agreement as and when necessary. The Deed of Trust and Mortgage and the Guarantee Agreement were executed between the President and the First National City Bank (as Trustee) on 15th June, 1967. In the meantime the Company made an application to the Collector under section 31 of the Act for opinion as to the stamp duty with which the Deed of Trust and Mortgage was chargeable, and the Collector referred the matter to the Board of Revenue. The Board decided on 28th June, 1967 that the duty was chargeable on the Trust and Mortgage Deed under Article 40(*b*) of Schedule I to the Act The Company paid Rs. 37,66,500 as stamp duty under protest, stating that it would move the Board for a reference of the controversy to the High Court. The Trust and Mortgage Deed was registered on 30th June, 1967, and the 'A' series debentures were issued the same day. The Company applied to the Board of Revenue to state the case to the High Court. 'B' series debentures were issued on 28th June, 1968. The case was started on 28th March, 1969 and was decided by the impugned decision of the High Court dated 9th October, 1974.

3. It has been argued by Mr. Ram Reddy for the appellant company that

the Guarantee Agreement was the principal and primary security and the Deed of Trust and Mortgage was a collateral or auxiliary security and that the stamp duty on the Deed of Trust and Mortgage was payable in accordance with Article 40 (c). It has been urged that the Guarantee Agreement was exempt from duty under section 3 of the Stamp Act and the debentures were exempt under Article 27.

4. The controversy centres round the question whether the Guarantee Agreement could be said to be the principal or primary security? Mr. Ram Reddy has invited our attention to the following passage in Sergeant on Stamp Duties and Companies Capital Duty, sixth edition page 6,—

"*Leading and principal object,*—

With reference to the stamp duty upon instruments generally, it is a well settled rule of law that an instrument must be stamped for its leading and principal object, and the stamp covers everything accessory to that object."

5. In *Limor Asphalte Paving Co.* v. *I.B.C.*[1] it was stated.—

"In order to determine whether any, and if any, what stamp duty is chargeable upon an instrument the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declare."

This appears to be a correct statement of the law. We have therefore to determine the real and true meaning of the Guarantee Agreement and to decide whether it could be said to be the principal and primary security.

6. The Loan and Note Purchase Agreement was executed on 20th December, 1966, between the company and the First National City Bank and others. Under that agreement, the company was to authorise the creation and issuance of secured notes, series A and B, referred to above, and the notes were to be "issued under and secured by the Deed of Trust and Mortgage between the company and the First National City Bank." It was then stated in the Loan and Note Purchase Agreement as follows:—

"The Notes shall be dated, shall mature, shall bear interest, shall be payable, shall be secured and shall have such other terms and provisions as provided in the Mortgage and shall be guaranteed by the President of India pursuant to the terms of a Guarantee Agreement (the "Guarantee Agreement) in the form attached hereto as Exhibit 3".

It would thus appear that it was the Deed of Trust and Mortgage which was the security for the loan, although the loan was also guaranteed by the President in terms of the Guarantee Agreement.

7. As has been stated, the Guarantee Agreement was made between the President of India and the First National City Bank. It was clearly stated in that agreement that the First National City Bank executed it "as Trustee under a Deed of Trust and Mortgage dated as of 15th June 1967." The Trust and Mortgage Deed was thus executed before the execution of the Guarantee Agreement, even though both of them were executed on the same day, namely, 15th June, 1967.

8. It is true that it has been stated in the Guarantee Agreement that the Presi-

1. (1872) 7 Ex. 211.

dent of India, as the guarantor, unconditionally guaranteed "as primary obligor and not as surety merely, the due and punctual payment from time to time" of the principal as well as the interest etc., stated in the agreement. And it was for that purpose that the guarantor agreed to "endorse upon each of the Notes at or before the issue and delivery thereof by the Company its guarantee of the prompt payment of the principal, interest and premium thereof and of the other indebtedness". It is also true that as stated in paragraph 10 of the Guarantee Agreement, the obligations of the guarantor were "absolute and unconditional under any and all circumstances, and shall not be to any extent or in any way charged, impaired or otherwise affected, except by performance thereof in accordance with the terms thereof." We have also noticed the further stipulation that "Each and every remedy of the Trustee shall, to the extent permitted by law, be cumulative and shall be in addition to any other remedy given hereunder or under the Mortgage or any of the other collateral or now or hereafter existing at law or in equity or by statute."

9. Mr. Ram Reddy has relied heavily on these averments in the Guarantee Agreement, but they cannot detract from the basic fact that the Deed of Trust and Mortgage was executed first in point of time and was the principal or primary security for the loan according to the terms and conditions of the agreement between the parties. It was that document which constituted the First National City Bank as the Trustee, and enabled it to enter into the Guarantee Agreement with the President, and the President guaranteed the due performance of the obligations undertaken by the company thereunder.

10. The Deed of Trust and Mortgage, which was executed between the company and the First National City Bank as a national banking association incorporated and existing under the laws of the United States of America, stated that as the company was in the process of constructing a refinery for the refining of crude oil and deemed it necessary to borrow money from time to time to finance such construction and to issue its Notes therefor and to "mortgage and charge its properties hereinafter described to secure the payment of such notes" it executed the Deed of Trust and Mortgage as security in accordance with the terms and conditions of Article 2 of the Deed of Trust and Mortgage to secure the due payment of the principal of and the premium, if any, and the interest on the Notes and of all other moneys for the time being and from time to time owing on the security of that Indenture and on the Notes and the performance by the company of all of its obligations thereunder. The Deed of Trust and Mortgage was therefore clearly the principal or the primary security and could not be said to be a "collateral agreement". The parties in fact clearly stated in Article 1, section 1.01 of the Deed of Trust and Mortgage as follows: —

> "*Collateral Agreements*
>
> The term "Collateral Agreements" shall mean the Guarantee Agreement and the Undertaking, hereinafter defined."

It was therefore specifically agreed between the parties that the Deed of Trust and Mortgage was not a collateral agreement.

11. In all these facts and circumstances it is futile to contend that the Deed of Trust and Mortgage was not the principal or primary security. As was stated in Article 9 of that document, that security became enforceable in case of any or more "events of default", and it cannot be said that merely because the

Guarantee Agreement contained the stipulation that the President, as the Guarrantor, unconditionally guaranteed the due and punctual payment of principal and interest etc. "as primary obligator and not as surety merely" that agreement became the principal or the primary security. It is the real and true meaning of the Deed of Trust and Mortgage and the Guarantee Agreement which has to be ascertained, and this leaves no room for doubt that the view taken by the High Court in this respect is correct and does not call for interference. Mr. Ram Reddy relied on some decisions to support his argument that the Guarantee Agreement was the security for the loan and was the principal or the primary document, but those cases were decided on different facts and have no real bearing on the controversy before us.

12. The Guarantee Agreement was executed for and on behalf of the President by his Authorised Representative, and no stamp duty was chargeable for it by virtue of the proviso to section 3 of the Act. That in fact appears to be the reason why counsel for the appellant strenuously argued that we should hold it to be the principal instrument, for he has next argued that the case falls within the purview of section 4 (1) of the Act and the "principal instrument" only would be chargeable with the duty prescribed in Schedule I, and deed of any trust and mortgage would be chargeable with a duty of Rs. 4.50 p. instead of the duty prescribed for it in that Schedule. We find however that there is no merit in this argument also. Sub-section (1) of section 4 of the Act reads as follows:—

"4. *Several instruments used in single transaction of sale, mortgage or settlement.*—(1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of four rupees fifty naye paise instead of the duty (if any) prescribed for it in that Schedule."

It is nobody's case that the Guarantee Agreement was an instrument of sale, for it did not transfer the ownership of anything in exchange for a price paid or promised or part-paid and part-promised. It was also not an instrument of mortgage because it is nobody's case that there was any transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan or an existing or a future debt or the performance of an engagement which could give rise to a pecuniary liability. The expression "settlement" has been defined in clause (24) of section 2 of the Act as follows:—

"'Settlement' means any non-testamentary disposition in writing, of movable or immovable property made:

(*a*) in consideration of marriage;

(*b*) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or

(*c*) for any religious or charitable purpose:

and includes an agreement in writing to make such a disposition (and, where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition)".

The term "disposition" has been defined in Stroud's Judicial Dictionary as a devise

"intended to comprehend a mode by which property can pass, whether by act of parties or by an act of the law" and "includes transfer and charge of property." As the Guarantee Agreement did not have any such effect, it did not constitute a "settlement" also. That document was not therefore an instrument of sale, mortgage or settlement and did not fall within the purview of sub-section (1) of section 4 of the Act.

13. It was the Deed of Trust and Mortgage which was a "mortgage deed" within the meaning of clause (17) of section 2 of the Act, and it was therefore clearly chargeable with stamp duty at the rate prescribed in Article 40 (b) of Schedule 1 to the Act.

14. We have examined the other argument of Mr. Ram Reddy that even if the Guarantee Agreement was not the principal instrument, within the meaning of sub-section (1) of section 4 of the Act, we should hold that the debentures which were issued by the company were the principal and primary security, and that the Deed of Trust and Mortgage was the "other instrument" within the meaning of that sub-section and was chargeable with a duty of Rs. 4.50 p. instead of the duty prescribed for it in the Schedule. This argument is also futile for we find that the secured Notes (Series A and B) were issued under and were secured by the Deed of Trust and Mortgage. As such, the Notes were issued in consequence and on the security of the Deed of Trust and Mortgage and there is no justification for the contention that the debentures were the principal instruments, and not the Deed of Trust and Mortgage.

15. As the High Court has rightly answered both the questions, we find no force in this appeal and it is dismissed with costs.

V.M.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—*Y. V. Chandrachud and P. K. Goswami, JJ.*

Palaniappa Gounder .. *Appellant**

v.

The State of Tamil Nadu and others .. *Respondents.*

Penal Code (XLV of 1860), section 302 *—Criminal Procedure Code,* 1973 *(II of* 1974), *section* 357 (1) (c)*—Murder—Sentence of life—Imprisonment combined with heavy fine—Fine imposed to enable heirs of deceased to obtain compensation under section* 357 (1) (c)*—Propriety and legality of.*

There can be no doubt that for the offence of murder Courts have the power to impose a sentence of fine under section 302 of the Penal Code. But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though therefore the High Court in the instant case had the power to impose on the appellant a sentence of fine along with the sentence of life-imprisonment under section 302 of Penal Code, the question still arises whether a sentence of fine of Rs. 20,000 is justified in the circumstances of the case. [*Paras.* 8, 9.]

We cannot go so far as to express approval of the unqualified view that a sentence of fine for an offence of murder is wholly inapposite. But before imposing the sentence of fine, particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so what is a proper or adequate fine to impose in the circumstances of the case. [*Para.* 9.]

Since by section 357 (1) (*c*) of the new Criminal Procedure Code and its precursor, section 545 (1) (*bb*) of the old

*Crl.A. No. 190 of 1976. *4th March,* 1977.

Code compensation can only come out of fine, it is always necessary to consider in the first instance whether the sentence of fine is at all called for, particularly when the offender is sentenced to death or life imprisonment. If so, the fine must not be excessive having regard to all the circumstances of the case, the motivation of the offence, the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine. [*Para.* 12.]

It appears that the High Court in the instant case first considered what compensation ought to be awarded to the heirs of the deceased and then imposed by way of fine an amount which was higher than the compensation because the compensation has to come-out of the amount of fine. Apart from the fact that even the compensation was not fixed on any reliable data, the High Court, put the cart before the horse in leaving the propriety of fine to depend upon the amount of compensation. The first concern of the Court, after recording an order of conviction, ought to be to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and sentence including the sentence of fine, must not be unduly excessive. The fine of Rs. 20,000 imposed by the High Court seems to be unduly excessive. In the circumstances it is reduced to a sum of Rs. 3,000 with a direction that the fine if realised, should be paid to the heirs of the deceased.

[*Paras.* 11, 13.]

Cases referred to:—

State v. *Pandurang Shinde,* A.I.R. 1956 Bom. 711; *Adamji Umer Dalal* v. *The State of Bombay,* 1952 S.C.R. 172: 1951 S.C.J. 820: 54 Bom.L.R. 400: A.I.R. 1952 S.C. 14.

The Judgment of the Court was delivered by

Chandrachud, J.—The appellant, Palaniappa Gounder, was convicted by the learned Principal Sessions Judge, Salem, under section 302 of the Penal Code and was sentenced to death on the charge that on 23rd August, 1974 he had committed the murder of one Sengoda Gounder. The appellant's son and daughter-in-law were convicted by the learned Judge for abetting the murder and were sentenced to life imprisonment. The three accused filed an appeal in the High Court of Madras which upheld the appellant's conviction under section 302 but reduced the sentence from death to imprisonment of life. However, while reducing the substantive sentence the High Court imposed a fine of Rs. 20,000 on the appellant and directed that out of the fine, if realised, a sum of Rs. 15,000 should be paid to the son and daughters of the deceased under section 357 (1) (*c*) of the Criminal Procedure Code (II of 1974). The other two accused were acquitted by the High Court. We are not concerned in this appeal with the legality of the appellant's conviction or with the acquittal of his daughter and son-in-law. The special leave granted by this Court is limited to the question of the propriety of the fine imposed by the High Court.

2. The reason and occasion for imposing the sentence of fine was that an application was filed before the High Court under section 482 of the Criminal Procedure Code by a son and two daughters of the deceased praying that the appellant, his son and daughter-in-law be asked to pay to them, as heirs of the deceased, compensation in the sum of Rs. 40,000 for the death of their father.

3. Section 482 of the Code under which the heirs of the deceased filed the application for compensation corresponds to section 561-A of the Criminal Procedure Code of 1898. It saves the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. A provision which saves the inherent powers of a Court cannot override any express provision contained in the statute which saves that power. This is put in another form by saying that if there is an express provision in a statute governing a particular subject-matter there is no scope for invoking or exercising the inherent powers of the Court because the

Court ought to apply the provisions of the statute which are made advisedly to govern the particular subject-matter. From this it will be clear that the application made by the heirs of the deceased for compensation could not have been made under section 482 since, section 357 expressly confers power on the Court to pass an order for payment of compensation in the circumstances mentioned therein. That did not, however, affect the power of the High Court to deal with the application because though the application was wrongly described as having been made under section 482 the High Court could deal with it as if it were made under section 357 of the Code. That in fact is what the High Court proceeded to do, for it passed the order of compensation not under section 482 but under section 357 (1) (*c*) of the Code.

4. Section 357 of the Code of Criminal Procedure (II of 1974), reads thus:

"357. *Order to pay compensation.*—(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

(*a*) in defraying the expenses properly incurred in the prosecution;

(*b*) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a civil Court;

(*c*) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act (XIII of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(*d*) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reasons to believe the same to be stolen, in compensating any *bona fide* purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any sum paid or recovered as compensation under this section."

5. Clauses (*a*), (*b*) and (*d*) of section 357 (1) need not be considered firstly because the High Court has passed the order of compensation under clause (*c*) and secondly because those clauses have no application. No order having been passed by the High Court for defraying the expenses incurred in the prosecution clause (*a*) does not come for consideration. Clause (*b*) has no application to cases in which the heirs of a person whose death has been caused apply for compensation because that clause deals with the payment of compensation to the very person to whom any

loss or injury has been caused as a result of the offence committed against him or his property and when compensation is recoverable by *such person* in a civil Court. Clause (*d*) deals with a different class of cases altogether and need not detain us.

6. Clause (*c*) of section 357 (1) under which the High Court has passed the order for compensation enables the Court to direct that the whole or any part of the fine recovered may be applied in paying compensation to the persons who are under the Fatal Accidents Act, 1855 entitled to recover damages from the person sentenced for the loss resulting to them from the death of the person whose heirs, as described in the Act of 1855, they claim to be. Since under the Act of 1855, persons who may be compensated are the wife, husband, parent (including grand-parents) and child (including grand-children and step-children), the application filed in the High Court was maintainable at the instance of the son and daughters of the deceased.

7. It cannot however be overlooked that the order for compensation can be passed under section 357 (1) (*c*) only when "a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part". We are concerned in this appeal to examine primarily the legality and propriety of the sentence of fine imposed by the High Court because upon that would depend the efficacy and indeed the very existence of the order for payment of compensation to the heirs of the deceased. The compensation, as provided in the section, has to come out of the fine. Therefore, if on a proper application of the principles of sentencing, the fine imposed by the High Court is found to be excessive and has therefore to be reduced, the order regarding the payment of compensation must suffer a corresponding variation.

8. There can be no doubt that for the offence of murder Courts have the power to impose a sentence of fine under section 302 of the Penal Code. That section provides that whoever commits murder shall be punished with death, or imprisonment for life, and "shall also be liable to fine". That is why section 357 (1) of the Code speaks of "a sentence (including a sentence of death) of which fine forms a part". That is only an instance of the practical application of section 302 under which not only a sentence of imprisonment for life but even a sentence of death can legitimately be combined with a sentence of fine.

9. But legitimacy is not to be confused with propriety and the fact that the Court possesses a certain power does not mean that it must always exercise it. Though, therefore, the High Court had the power to impose on the appellant a sentence of fine along with the sentence of life imprisonment the question still arises whether a sentence of fine of Rs. 20,000 is justified in the circumstances of the case. Economic offences are generally visited with heavy fines because an offender who has enriched himself unconscionably or unjustifiably by violating economic laws can be assumed legitimately to possess the means to pay that fine. He must disgorge his ill-gotton wealth. But quite different considerations would, in the generality of cases, apply to matters of the present kind. Though there is power to combine a sentence of death with a sentence of fine that power is sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. In fact, the common trend of sentencing is that even a sentence of life imprisonment is seldom combined with a heavy sentence of fine. We cannot, of course, go so far as to express approval of the unqualified view taken in some of the cases that a sentence of fine for an offence of murder is wholly "inapposite" (see, for example, *State* v. *Pandurang Shinde*[1]), but before imposing the sentence of fine particularly a heavy fine, along with the sentence of death or life imprisonment, one must pause to consider whether the sentence of fine is at all called for and if so, what is a proper or adequate fine to impose in the circum-

1. A.I.R. 1956 Bom. 711.

stances of the case. As observed by this Court in *Adamji Umar Dalal* v. *The State of Bombay*[1], determination of the right measure of punishment is often a point of great difficulty and no hard and fast rule can be laid down, it being a matter of discretion which is to be guided by a variety of considerations but the Court must always bear in mind the necessity of maintaining a proportion between the offence and the penalty proposed for it. Speaking for the Court Mahajan, J., observed in that case that:

> "in imposing a fine it is necessary to have as much regard to the pecuniary circumstances of the accused persons as to the character and magnitude of the offence, and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases" (page 177)".

Though that case related to an economic offence, this Court reduced the sentence of fine from Rs. 42,300 to Rs. 4,000 on the ground that due regard was not paid by the lower Court to the principles governing the imposition of a sentence of fine.

10. The High Court imposed in the instant case a fine of Rs. 20,000 on the ground that "the deceased was aged about 48 years and was actively supervising the cultivation of the family lands and would have lived for another 15 to 20 years with his abilities intact, and the loss to the dependants, *viz.*, the son and daughters would be about Rs. 20,000". Except for the bald and bare statements contained in the petition for compensation filed by the heirs of the deceased, there is no warrant for the assumption made by the High Court as regards the retention of "abilities in tact" or as regards the extent of "loss to the dependants".

11. It appears to us that the High Court first considered what compensation ought to be awarded to the heirs of the deceased and then imposed by way of fine an amount which was higher than the compensation because the compensation has to come out of the amount of fine. Apart from the fact that even the compensation was not fixed on any reliable data, the High Court, with respect, put the cart before the horse in leaving the propriety of fine to depend upon the amount of compensation. The first concern of the Court, after recording an order of conviction, ought to be to determine the proper sentence to pass. The sentence must be proportionate to the nature of the offence and the sentence, including the sentence of fine, must not be unduly excessive. In fact, the primary object of imposing a fine is not to ensure that the offender will undergo the sentence in default of payment of fine but to see that the fine is realised, which can happen only when the fine is not unduly excessive having regard to all the circumstances of the case, including the means of the offender.

12. Section 357 (1) (*c*) of the new Code corresponds to section 545 (1) (*bb*) of the Code of 1898 which was introduced by section 110 of Amending Act XXVI of 1955. The Statement of Objects and Reasons of that Act shows that the Joint Committee took the view that in suitable cases, the person who causes death should compensate the heirs and dependants of the deceased for the loss resulting from the death. The Joint Committee was in full agreement with the view that in a case where death has resulted from homicide, the Court should award compensation to the heirs of the deceased because that would result "in settling the claim once for all by doing away with the need for a further claim in a civil Court, needless worry and expense to both sides of the party". The views of the Joint Committee incorporated in the Statement of Objects and Reasons to the Amending Act of 1955 are undoubtedly entitled to consideration but those views only reflect that there should reside in the criminal Court the power in appropriate cases to pass an order of compensation in favour of the heirs of the deceased. It cannot, however, be overlooked that since by section 357 (1) (*c*) of the new Code and its precursor, section 545 (1) (*bb*) of the old Code, compensation can only come out of fine, it is

1. 1951 S.C.J. 820: 1952 S.C.R. 172: 54 Bom. L.R. 400: A.I.R. 1952 S.C. 14.

always necessary to consider in the first instance whether the sentence of fine is at all called for, particularly when the offender is sentenced to death or life imprisonment. If so, the fine must not be excessive, having regard to all the circumstances of the case like motivation of the offence, the pecuniary gain likely to have been made by the offender by committing the offence and his means to pay the fine.

13. The High Court, instead of applying its mind to these factors, considered only what compensation the heirs of the deceased ought to receive. And that question it decided on inadequate data. In view of the fact that the appellant was under the sentence of death since its imposition by the Sessions Court and its reduction to life imprisonment by the High Court and since a sentence of life imprisonment has been imposed on the appellant, that being the only other sentence permissible under the law, the fine of Rs. 20,000 imposed by the High Court seems to us unduly excessive. In the circumstances we reduce it to a sum of Rs. 3,000 and direct that the fine or so much of it as is recovered shall be paid to the son and daughters of the deceased who had filed the petition in that behalf in the High Court.

V.K. *Order accordingly.*

[End of Volume (1978) 1 M.L.J. (Supreme Court.)].